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Nos. 04-1203 & 04-1236

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IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

THE STATE OF GEORGIA *et al.*,

Respondents.

TONY GOODMAN,

Petitioner,

v.

THE STATE OF GEORGIA *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE ARC OF THE UNITED STATES, THE BAZELON CENTER FOR MENTAL HEALTH LAW, THE NATIONAL MENTAL HEALTH ASSOCIATION, THE NATIONAL ASSOCIATION OF COUNCILS ON DEVELOPMENTAL DISABILITIES, AND THE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI* [1]

Amici are national organizations of mental disability professionals and citizens (more fully described in the Appendix) with longstanding concerns about constitutional and statutory protections for people with mental disabilities in the criminal justice system.

SUMMARY OF ARGUMENT

This case presents the issue of Congress' authority, under Section 5 of the Fourteenth Amendment, to enact Title II of the Americans with Disabilities Act in the context of state prisons. Although Petitioner's individual claim involves a physical disability, this Court's ruling will have a major impact on inmates with mental disabilities.

A number of factors influence the presence of individuals with mental retardation and severe mental illness in prisons and jails. In a background section, *amici* offer their understanding of these historical, legal, and social factors.

Within prisons and jails, inmates with mental disabilities have been subjected to documented mistreatment and discrimination in violation of the Constitution. While these violations include deprivations of Equal Protection and Due Process, *amici* will focus on discriminatory failure to provide needed treatment and habilitation, and on conditions of confinement that violate the Eighth Amendment rights of prisoners with mental disabilities.

Amici recognize that Title II is a statute of carefully limited scope, and understand that not every denial of treatment and habilitation necessarily falls within the ambit of the Act. But

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[1] This brief was written entirely by counsel for *amici*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. All parties have given written consent to the filing of this brief.

many, assuredly, will. And when prisoners are treated in a discriminatory manner because of the existence or manifestations of their mental disability, the Eleventh Amendment should not be interpreted as creating a barrier between those inmates and the relief Congress has afforded them.

Congress addressed these problems with care and circumspection in enacting Title II. The balancing of individual rights and institutional interests reflected in the statute mirror the caution with which this Court has confronted constitutional issues in the context of prison administration. This balanced legislative approach reflects the level of congruence and proportionality that this Court has required for enactments under Section 5 of the Fourteenth Amendment. By creating a statutory remedy for these constitutional violations, Congress has avoided the necessity of repeated and extensive constitutional litigation in individual cases, and retained the opportunity to refine its remedies as experience with the Act may dictate.

BACKGROUND

From the earliest days of the Republic, individuals with mental disabilities have found themselves in the criminal justice system. Societal attitudes toward mental illness and developmental disabilities have influenced the disposition of such individuals, including incarceration in state prisons. *See, e.g.*, Dorthea L. Dix, *Remarks on Prisons and Prison Discipline* (1845, 1984 repr.); Norman Dain, *Concepts of Insanity in the United States 1789-1865*, at 129 (1964).

Today's correctional facilities continue to confine inmates with mental disabilities. In addition to individual criminal conduct, the presence of inmates with serious mental disabilities is influenced both by the legacy of past attitudes and by public policies States have adopted in more recent times.

Prisoners with serious mental illness.

Over the course of our nation's history, the boundaries between and distinctive roles of prisons and mental health facilities have been far from static. *See generally* Michael Stephen Hindus, *Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina 1767-1878*, at 204-05 (1980); Gerald N. Grob, *The Mad Among Us: A History of the Care of America's Mentally Ill* 74-77 (1994); David J. Rothman, *Conscience and Convenience: The Asylum and Its Alternatives in Progressive America* (rev. ed. 2002).

But even after the two types of institutions had been clearly delineated in law and administrative practice, substantial numbers of individuals with serious mental illness have been incarcerated in state prisons.[2]

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[2] At the present time, although several attempts have been made to estimate the number of prisoners who have such mental illnesses, it is impossible to quantify the number of inmates who have serious mental illness with any degree of precision. *See, e.g.*, The President's New Freedom Commission on Mental Health, *Transforming Mental Health Care in America* 32 (2003) ("about 7% of all incarcerated people have a current serious mental illness"); American Psychiatric Association, *Psychiatric Services in Jails and Prisons* xix (2d ed. 2000) ("up to 5% are actively psychotic"). Other attempts to estimate the prevalence appear to have used a substantially more expansive definition of mental illness. *See, e.g.*, Bureau of Justice Statistics, U.S. Dept. of Justice, *Mental Health and Treatment of Inmates and Probationers* (July 1999) (16% of state prison inmates either identified as having "a mental condition" or having stayed overnight in a mental hospital). *Cf. Albertson's Inc. v. Kirkingburg*, 527 U.S. 555, 565 (1999) (ADA addresses only functional limitations "that are in fact substantial"). Differences in definitions of serious mental illness and wide variations in research methodology warrant considerable caution in evaluating the estimates from these and other sources.

Prisoners with mental retardation and other serious developmental disabilities.

The relationship between mental retardation[3] and the criminal justice system has a long and disturbing history. In the first half of the twentieth century, there was a widespread belief that people with mental retardation constituted a danger to society because of their perceived propensity to commit criminal acts.[4] *See, e.g.*, Nicole Rafter, *The Criminalization of*

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[3] For organizational purposes, this brief will separately address prisoners with mental illnesses and prisoners with mental retardation and other developmental disabilities. There is, however, a sense in which this dichotomy is potentially misleading. Mental illness and mental retardation are not mutually exclusive categories. Individuals with mental retardation may also have mental illness, and studies suggest that the incidence of mental illness among individuals with mental retardation is somewhat higher than it is in the general population. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 45 (4th ed., text rev. 2000) ("Individuals with Mental Retardation have a prevalence of comorbid mental disorders that is estimated to be three to four times greater than in the general population."); AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 172-75 (10th ed. 2002); Johannes Rojahn & Marc J. Tassé, *Psychopathology in Mental Retardation*, in American Psychological Association, *Manual of Diagnosis and Professional Practice in Mental Retardation* 147-56 (John W. Jacobson & James A. Mulick eds., 1996). Needless to say, the damage caused by failure of prison authorities to provide needed habilitation, mental health treatment, or both, is seriously compounded if the prisoner has both disabilities. *See, e.g.*, American Psychiatric Association, *Psychiatric Services in Jails and Prisons* 59 (2d ed. 2000) ("Inmates with this combination of difficulties are unfortunately the most likely to be preyed upon and ridiculed by other inmates. Their inability to process information rapidly or to comprehend instructions, their low frustration tolerance, and their impulsivity may have severe disciplinary consequences."). There is also reason for concern that their "behaviors will be misperceived as intentional rule infractions or attributed solely to mental retardation while serious mental illness goes untreated." *Id.*

[4] The public's fears were aggravated by assertions from mental disability professionals of the day that extraordinary percentages of crimes in society were committed by individuals with mental retardation. *See, e.g.*,

Mental Retardation, in *Mental Retardation in America: A Historical Reader* 232-57 (Steven Noll & James W. Trent, Jr., eds. 2004). Along with eugenic sterilization, lifelong segregation and incarceration were the centerpieces of the response to this perceived threat.[5] *See, e.g.*, James W. Trent, Jr., *Inventing the Feeble Mind: A History of Mental Retardation in the United States* 142-44 (1994). Often this segregation was accomplished in geographically isolated institutions, but in other cases it led to the establishment of specialized

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Henry Herbert Goddard, *Feeblemindedness: Its Causes and Consequences* 8–9 (1914) (estimating that as many as 50% of criminals might be "mentally defective"). *See generally* Henry Herbert Goddard, *The Criminal Imbecile* (1915); J. David Smith, *Minds Made Feeble: The Myth and Legacy of the Kallikaks* (1985).

[5] The vehemence with which these policies of segregation and isolation were argued is, to modern sensibilities, chilling. *See, e.g.*, Lewis M. Terman, *The Intelligence of School Children* 132-33 (1919) ("The feeble-minded . . . are by definition a burden rather than an asset, not only economically but still more because of their tendencies to become delinquent or criminal. To provide them with costly instruction for a few years, and then turn them loose upon society as soon as they are ripe for reproduction and crime, can hardly be accepted as an ultimate solution of the problem. The only effective way to deal with the hopelessly feeble-minded is by permanent custodial care."); Henry Carey, *A Plea for the Sterilization of Certain Defectives, Particularly the Feeble-Minded and Epileptic* 4-5 (1912) ("What shall we do with the feeble-minded and epileptic already existing? One school says vasectomy, another castration, and still another segregation. None of these is correct in whole but in part only. To reach the proper solution of this question both sterilization, in some form or other, and segregation must be carried out, castration or vasectomy being used as adjuncts to segregation, and going hand in hand with it."); W. E. Fernald, *The Burden of Feeblemindedness*, 17 J. Psycho-Aesthenics 87, 90 (Mar. 1912) ("The past few years have witnessed a striking awakening of professional and popular consciousness of the widespread prevalence of feeble-mindedness and its influences as a source of wretchedness to the patient himself and to his family, and as a causative factor in the production of crime, prostitution, pauperism, illegitimacy, intemperance and other complex social diseases . . . . They cause unutterable sorrow at home and are a menace and danger to the community.").

penal institutions, such as the "Virginia State Prison Farm for Defective Miscreants." Steven Noll, *Feeble-Minded in Our Midst: Institutions for the Mentally Retarded in the South 1900-1940*, at 117-20 (1995). Whether the confinement in a particular institution was denominated as civil or criminal, it is clear that the public's fear of people with mental retardation was central to its purpose.

As will be discussed below, the conditions under which inmates with mental retardation are confined may reflect the persistence of some of these views, and remain a source of serious concern.[6]

Factors influencing the incarceration of individuals with mental disabilities in prisons and jails today.

As with any prison inmate, the central reason for the incarceration of these individuals with disabilities is their own criminal conduct. But for prisoners who have mental illness or developmental disabilities, there are other causative factors worth noting.

One such factor, for many of these inmates, is the effect of their mental disabilities on the behavior that led to criminal

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[6] As with serious mental illness, there is no precise measurement of how many inmates in state prisons have mental retardation or other serious developmental disabilities. While the incidence of mental retardation in society is estimated at three percent or less, *see Atkins v. Virginia*, 536 U.S. 304, 309 n.5 (2002), there are indications that the numbers in prison populations in some States may be somewhat higher. One widely cited survey of correctional authorities places the incidence of mental retardation in federal and state prisons at 4.2%. Louis Veneziano & Carol Veneziano, *Disabled Inmates*, in *Encyclopedia of American Prisons* 157-61 (Marilyn D. McShane & Frank P. Williams III eds., 1996). *See generally* Joan Petersilia, *Doing Justice?: The Criminal Justice System and Offenders with Developmental Disabilities* 38-40 (California Research Policy Center 2000). Because of the different demographics involved in different types of crimes, the percentage could be slightly higher in state prisons than in the federal system.

charges. While it is not true that people with mental illness are unusually likely to commit criminal acts, much less acts of physical violence, there is often at least some causal relationship between an individual's mental illness and the criminal behavior that led to incarceration. *See, e.g.*, Paul S. Appelbaum, Pamela Clark Robbins & John Monahan, *Violence and Delusions: Data From the MacArthur Violence Risk Assessment Study*, 157 Am. J. Psychiatry 566, 566 (2000) ("although most acts of violence perpetrated by psychotic persons are not motivated by delusions, a substantial minority of their violent acts appears to be delusionally driven"); Keith Hersh & Randy Borum, *Command Hallucinations, Compliance, and Risk Assessment*, 26 J. Am. Acad. Psychiatry & Law 353 (1998); Bruce G. Link & Ann Steuve, *Psychotic Symptoms and the Violent/Illegal Behavior of Mental Patients Compared to Community Controls*, in *Violence & Mental Disorder: Developments in Risk Assessment* 137-59 (John Monahan & Henry J. Steadman eds., 1994).[7]

Similarly, for defendants who have mental retardation, several attributes associated with their disability may have influenced their behavior. As this Court has observed, "Because of their impairments, . . . by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Atkins v.*

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[7] Far more frequent than these crimes of violence are the many relatively minor offenses for which substantial numbers of individuals with mental disabilities are prosecuted. *See* Arthur J. Lurgio, Angie Rollins & John Fallon, *The Effects of Serious Mental Illness on Offender Reentry*, 68 Federal Probation 45, 46 (September 2004) (noting "recent adoption of law enforcement strategies that emphasize quality-of-life issues and zero tolerance policies in response to public-order offenses: loitering, aggressive panhandling, disturbing the peace, and urinating in public. These strategies have netted large numbers of the mentally ill for publicly displaying the symptoms of untreated [serious mental illness].").

Virginia, 536 U.S. 304, 318 (2002). *Amici* do not suggest, of course, that all such individuals should be absolved from responsibility or excused from imprisonment as punishment for criminal conduct. "[B]ut there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal responsibility." *Id.* As a result, offenders with developmental disabilities can be seen as "categorically less culpable than the average criminal." *Tennard v. Dretke*, 542 U.S. ___, 124 S. Ct. 2562, 2571 (2004) (quoting *Atkins*, 536 U.S. at 316). This observation is equally true for defendants facing non-capital sentencing. *See generally* Am. Bar Ass'n, *Standards for Criminal Justice* § 7-9.3 ("Evidence of mental illness or mental retardation should be considered as a possible mitigating factor in sentencing a convicted offender.").

But the nexus between mental disability and criminal conduct does not, of course, necessarily eliminate the practical likelihood that individuals with mental illness or mental retardation will end up in prison, or reduce the duration of their confinement. *See generally* Victoria Harris & Christos Dagadakis, *Length of Incarceration: Was There Parity for Mentally Ill Offenders?*, 27 Int'l J.L. & Psychiatry 387 (2004).

Several developments in the States have had the effect (mostly unintended) of increasing the number of prison inmates who have mental disabilities. First, a number of States have reduced or eliminated the availability of a complete defense based on mental disability. A few States have abolished the insanity defense completely,[8] and a larger number

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[8] *See* Idaho Code § 18-207 (Michie 1996); Kan. Stat. Ann. §§ 22-3219–3220 (1996); Mont. Code Ann. § 46-14-102 (2003); Utah Code Ann. § 76-2-305 (2003). *See also Foucha v. Louisiana*, 504 U.S. 71, 98 (1992) (Kennedy, J., dissenting). The Nevada Supreme Court invalidated

have restricted its availability to those defendants whose mental disability vitiated their ability to understand their actions.[9] Second, there has been movement away from the doctrine of "diminished capacity" or "diminished responsibility," which had served to reduce the sentence of defendants whose mental disabilities affected their culpability but fell short of the insanity defense.[10] Third, more than a dozen States have adopted the alternative verdict form of "guilty but mentally ill" (GBMI), which provides for the imprisonment of defendants who were mentally ill at the time of their offense, but who do not meet the requirements of the insanity defense.[11] In addition, state sentencing policies and guidelines may also have the unintended consequence of increasing the duration of confinement for some inmates with mental disabilities.[12]

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legislation which would have abolished the defense, but narrowed availability of the defense to a subset of defendants who were in "a delusional state" at the time of the offense. *Finger v. State*, 27 P.3d 66, 84-85 (Nev. 2001).

[9] Particularly in the decades since the public controversy that surrounded the Hinckley case, a number of state courts and legislatures have replaced the Model Penal Code's broader scope with the more restrictive provisions of the *M'Naghten* test. *See* Wayne R. LaFave, *Criminal Law* § 7.2 n.7 (2003). In these States, defendants who are "unable to conform their conduct to the requirements of law" because of their mental illness or mental retardation are subject to conviction and imprisonment.

[10] *See, e.g.*, Cal. Penal Code § 25(a) (West 1982). This legislation, enacted by popular initiative in 1982, overturned the judicially-created doctrine employed in cases such as *People v. Wells*, 202 P.2d 53 (Cal. 1949).

[11] Unlike diminished capacity, GBMI verdicts do not require reduction in the duration of a defendant's sentence, nor do they mandate that the inmate be provided with mental health treatment. *See* Henry J. Steadman et al., *Before and After Hinckley: Evaluating Insanity Defense Reform* 102-20 (1993) (implementation of GBMI in Georgia resulted in substantially longer sentences and longer duration of confinement).

[12] It does not appear that many States have placed as many structural restrictions on the consideration of mental disability as a mitigating factor in noncapital sentencing as the Federal Sentencing Guidelines have. *Cf.*

A much more troubling development is the apparent phenomenon of jails and prisons being transformed into the default disposition for individuals who might previously have received treatment or habilitation in clinical settings. Some have referred to this phenomenon as prisons becoming "the new asylums."[13] While we do not know all the precise ways that individuals with serious mental illness now find themselves in prisons rather than in treatment facilities,[14] some of the processes are becoming clear. One is that law enforcement officers may be increasingly likely to see criminal charges as the appropriate response to behavior that might also be characterized as indicative of the need for mental health services. This appears particularly likely if the police officers have been frustrated in past efforts to divert disrup-

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U.S. Sentencing Guidelines Manual § 5K2.13 (prior to amendment in 1998, downward departures were precluded for any inmate who had a substantial mental disability but was convicted of a crime involving violence). But provisions regarding repeat offenses may have the opposite effect. *See generally Almendarez-Torres v. United States*, 523 U.S. 224, 243 (1998) (recidivism laws "currently are in effect in all 50 States"). The increasing emphasis some States place on a defendant's "criminal history" may have the unintended effect of substantially extending the incarceration of individuals whose mental disability has led them to repeatedly commit relatively minor offenses. *See* Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 Colum. L. Rev. 1190, 1201 n.55 (2005) (citing substantial increases in some States in presumptive prison duration based on criminal history).

[13] *See, e.g., Impact of Mentally Ill Offenders on the Criminal Justice System: Hearing Before the House Subcomm. on Crime*, 106th Cong. 8 (statement of Rep. Ted Strickland). *See generally* E. Fuller Torrey et al., *Criminalizing the Seriously Mentally Ill: The Abuse of Jails as Mental Hospitals* (1992); Human Rights Watch. *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* (2003). This phenomenon has also been noted by journalists. *See, e.g.*, Fox Butterfield, *Prisons Replace Hospitals for the Nation's Mentally Ill*, N.Y. Times, Mar. 5, 1998, at A1.

[14] T. Howard Stone, *Therapeutic Implications of Incarceration for Persons with Severe Mental Disorders: Searching for Rational Health Policy*, 24 Am. J. Crim. L. 283, 291 (1997).

tive individuals into community mental health facilities.[15] In addition, there may also be substantial (and perverse) financial incentives to turn to the criminal justice system instead of treatment or habilitation in community settings. Robert D. Miller, *Economic Factors Leading to Diversion of the Mentally Disordered from the Civil to the Criminal Commitment Systems*, 15 Int'l J.L. & Psychiatry 1 (1992). These are often exacerbated by the chronic underfunding of community mental health and mental retardation systems. T. Howard Stone, *Therapeutic Implications of Incarceration for Persons with Severe Mental Disorders: Searching for Rational Health Policy*, 24 Am. J. Crim. L. 283, 291-96 (1997).

Once incarcerated, prison conditions can cause a substantial worsening of the symptoms an inmate had prior to incarceration.[16] *See generally Ford v. Wainwright*, 477 U.S. 399,

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[15] *See, e.g.*, Linda A. Teplin, *Policing the Mentally Ill: Styles, Strategies, and Implications in Jail Diversion for the Mentally Ill* 10, 12-14 (Henry J. Steadman ed., 1990); Richard J. Freeman & Ronald Roesch, *Mental Disorder and the Criminal Justice System: A Review*, 12 Int'l J.L. & Psychiatry 105, 107 (1989). *See generally* Am. Bar Ass'n, *Standards for Criminal Justice* § 7-2.5 cmt. at 40 ("mentally disturbed persons by their actions frequently violate minor criminal legislation and thus are subject to criminal arrest. . . . [P]olice officers who are unclear about their authority to process mentally disturbed persons, or who are disillusioned about mental health and mental retardation facility inaction in such cases, are likely to ignore their emergency custodial powers and pursue the criminal arrest procedures with which they are thoroughly familiar."); Linda A. Teplin & Nancy S. Pruett, *Police as Streetcorner Psychiatrist: Managing the Mentally Ill*, 15 Int'l J.L. & Psychiatry 139 (1992); J. Steven Lamberti & Robert L. Weisman, *Persons with Severe Mental Disorders in the Criminal Justice System*, 75 Psychiatric Q. 151, 153 (2004) (principal problems for law enforcement are lack of training about mental illness and lack of effective interaction with mental health service providers); Heidi S. Vermette, Debra A. Pinals & Paul S. Appelbaum, *Mental Health Training for Law Enforcement Professionals*, 33 J. Am. Acad. Psychiatry & Law 42 (2005).

[16] This problem appears to be especially severe for female prisoners. *See generally* Linda A. Teplin, Karen M. Abram & Gary M. McClelland,

402-03 (1986). And certain forms of incarceration are particularly likely to cause or exacerbate serious mental illness in some inmates. Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 Crime & Delinquency 124, 130 (2003) (adverse symptoms include "rage, loss of control, paranoia, hallucinations, and self-mutilations"); *id.* at 148 (Mental health problems "exacerbated by the tendency of correctional systems to place a disproportionate number of previously mentally ill prisoners in supermax confinement, to ignore emerging signs of mental illness among the supermax population, and to fail to provide fully adequate therapeutic assistance to those prisoners who are in psychic pain and emotional distress."). *See generally Wilkinson v. Austin*, 545 U.S. __, 125 S. Ct. 2384, 2394-95 (2005).

While it is unlikely, absent physical injury or other traumatic event, that incarceration would produce mental retardation (or comparable dementia) in an individual who did not have mental retardation earlier in life, conditions of confinement may cause further mental deterioration.[17] *See Youngberg v. Romeo*, 457 U.S. 307, 327 (1982) (Blackmun, J., concurring) (appropriate "to include within the minimally adequate training required by the Constitution such training as is reasonably necessary to prevent a person's pre-existing self-care skills from *deteriorating* because of his commit-

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Mentally Disordered Women in Jail: Who Receives Services?, 87 Am. J. Pub. Health 604 (1997) (female jail inmates are more likely to have serious mental health problems but are less likely to have access to mental health treatment than male inmates); Howard M. Kravitz, James L. Cavanaugh, Jr. & Sandra S. Rigsbee, *A Cross-Sectional Study of Psychosocial and Criminal Factors Associated with Arrest in Mentally Ill Female Detainees*, 30 J. Am. Acad. Psychiatry & Law 380 (2002).

[17] *See generally Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 7 (1981) (describing "undisputed" findings "that the physical, intellectual, and emotional skills of some residents have deteriorated at Pennhurst").

ment") (emphasis in original, citations omitted). Providing habilitation to prevent deterioration and atrophy is no less essential in jails and prisons.

A final factor that may increase the number of individuals with mental disabilities in state prisons, or prolong their incarceration, is the enduring residue of fear and prejudice that long marked public attitudes toward people with these disabilities. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 464 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) ("Prejudice, once let loose, is not easily cabined."); *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring) ("Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves."). Judges and juries responsible for conviction and sentencing are not always immune from such lingering sentiments, *see Olmstead v. L.C.*, 527 U.S. 581, 611 (1999) (Kennedy, J., concurring in the judgment) ("the line between animus and stereotype is often indistinct"), and this fact has the potential to produce longer sentences of imprisonment.[18] In some cases, it may even contribute to wrongful conviction. See generally *Atkins*, 536 U.S. at 317 ("some characteristics of mental retardation undermine the strength

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[18] There are some indications that the public perception problem is getting worse. *See* Jo C. Phelan et al., *Public Conceptions of Mental Illness in 1950 and 1996: What is Mental Illness and Why Is It to be Feared?*, 41 J. Health & Soc. Behav. 188 (2000) (while there is increased acceptance of people with milder mental illness, perception that individuals with psychotic illness are dangerous has more than doubled); Patrick W. Corrigan & Amy E. Cooper, *Mental Illness and Dangerousness: Fact or Misperception, and Implications for Stigma*, in American Psychological Association, *On the Stigma of Mental Illness: Practical Strategies for Research and Social Change* 165-79 (Patrick W. Corrigan ed., 2005).

of the procedural protections that our capital jurisprudence steadfastly guards"); *See generally* Margaret Edds, *An Expendable Man: The Near-Execution of Earl Washington, Jr.* (2003).

ARGUMENT

I. PRISONERS WHO HAVE MENTAL DISABILITIES ARE PARTICULARLY VULNERABLE TO THE MISTREATMENT AND DISCRIMINATION ADDRESSED BY THE ADA.

A. Failure to provide needed treatment or habilitation imperils the safety and health of prisoners with mental disabilities.

Among the most serious types of unconstitutional conduct that prisoners who have mental disabilities may suffer is the failure to provide needed mental health treatment or habilitation. The Punishments Clause of the Eighth Amendment requires the provision of needed medical care. *Estelle v. Gamble*, 429 U.S. 97, 102-04 (1976).[19] The constitutional rationale for this obligation applies as fully to mental disability treatment as it does to therapy for physical ailments or injuries.

Serious mental illness, if left untreated, can leave an inmate in the most excruciating form of mental agony. *Olmstead*, 527 U.S. at 609-10 (Kennedy, J., concurring in the judgment) ("It must be remembered that for the person with severe mental illness who has no treatment the most dreaded of confinements can be the imprisonment inflicted by his own mind, which shuts reality out and subjects him to the torment of voices and images beyond our own powers to describe.").

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[19] As this Court has repeatedly held, remedial legislation can permissibly extend beyond the Constitution's direct command. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 518 (1997). By the same token, *amici* recognize that not every constitutional violation will necessarily come within the ambit of Title II.

See also Marjorie Rock, *Emerging Issues with Mentally Ill Offenders: Causes and Social Consequences*, 28 Admin. & Policy in Mental Health 165, 171 (2001) ("For a newly detained inmate there is often an increased risk of suicide, and for all incarcerated mentally ill persons there is often increased personal risk for becoming a victim as well as the potential for high rates of decompensation and deterioration."); Joel A. Dvoskin & Henry J. Steadman, *Chronically Mentally Ill Inmates: The Wrong Concept for the Right Services*, 12 Int'l J.L. & Psychiatry 203, 205 (1989) ("[M]entally ill inmates tend to encounter a whole range of brand new problems in prison, to which they may be especially susceptible due to their mental illness. Examples here include such things as predatory inmates, avoiding disciplinary infractions, visits, and authority problems."). *See* Richard J. Freeman & Ronald Roesch, *Mental Disorder and the Criminal Justice System: A Review*, 12 Int'l J.L. & Psychiatry 105, 110 (1989) ("In population, they are significantly more likely to be involved in 'incidents,' ranging from assault by other inmates, altercation with guards, and generally bizarre behavior, to self mutilation and suicide attempts."); Robert W. Dumond, *Confronting America's Most Ignored Crime Problem: The Prison Rape Elimination Act of 2003*, 21 J. Am. Acad. Psychiatry & Law 354, 355 (2003) (inmates with mental illness or developmental disabilities "especially vulnerable" to sexual victimization).

Documented instances of jail and prison inmates who are not provided adequate treatment for their serious mental illness are deeply troubling. *See, e.g.*, *Cody v. Hillard*, 599 F. Supp. 1025, 1058-59 (D.S.D. 1984) (failure to provide mental health treatment to inmates with "serious psychiatric needs," noting that "some of these inmates have experienced deterioration in physical health because their mental health needs have gone untreated."); *Balla v. Idaho State Board of Corrections*, 595 F. Supp. 1558, 1578 (D. Idaho 1984) (psychiatric care found "virtually nonexistent," representing "deliberate

indifference to the serious medical needs of the inmates"); *Mitchell v. Untreiner*, 421 F. Supp. 886, 891 (N.D. Fla. 1976) (jail provided "no psychological or psychiatric treatment" and inmates with mental illness were segregated in inadequate conditions). Far too frequently, when there is no serious effort to provide mental health treatment, the only semblance of treatment offered to inmates with serious mental illness is psychotropic medication, and often, in such circumstances, the medication is inappropriately (and dangerously) administered. *See, e.g., Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1989) (failure "to properly diagnose mental conditions, failure to prescribe proper medication and prescription of inappropriate medication, failure to provide any meaningful treatment other than medication"); *Battle v. Anderson*, 376 F. Supp. 402, 415 (E.D. Okla. 1974) (no professional psychiatric staff in prison and "only 'treatment' available at the penitentiary consists of temporary relief from 'distress' through sedation"). *See also Coleman v. Wilson*, 912 F. Supp. 1282, 1309-11 (E.D. Cal. 1995).[20]

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[20] Numerous cases have revealed deliberate indifference in the failure to provide adequate staffing for the treatment of inmates with serious mental illness. *See, e.g., Ramos v. Lamm*, 639 F.2d 559, 577-78 (10th Cir. 1980) (expert testimony that the lack of mental health services "contributes to inmate suffering and at times causes suicide and self-mutilation by inmates"); *Coleman*, 912 F. Supp. at 1315 (understaffing produces failure to provide an adequate program of suicide prevention); *Madrid v. Gomez*, 889 F. Supp. 1146, 1226 (N.D. Cal. 1995) (failure to provide mental health care "so clearly and grossly deficient that it only highlights defendants' striking indifference to the mental health" of inmates); *Tillery v. Owens*, 719 F. Supp. 1256, 1302 (W.D. Pa. 1989) ("Officials at SCIP have violated the eighth amendment with respect to psychiatric and psychological care in at least two ways: they have failed to provide adequate staffing; they have failed to maintain an environment conducive to treatment of serious mental illness."). In addition, courts have identified as a constitutional violation the failure to perform adequate screening and diagnosis when symptoms of mental illness are apparent. *See, e.g., Coleman*, 912 F. Supp. at 1305 ("Under the Eighth Amendment the defendants

Similarly, a prison or jail's deliberate indifference to needed habilitation for inmates with mental retardation or other substantial developmental disabilities can cause enduring, sometimes permanent, harm. For many individuals with mental retardation, being deprived of needed treatment and habilitation does not merely mean that they will fail to improve or to gain important skills; they may in fact lose crucial life skills that they had before they were imprisoned. This can mean the loss of the ability to communicate, perform daily self-care, remain physically safe, and to maintain even rudimentary emotional stability. *Cf. Pennhurst*, 451 U.S. at 7; *Youngberg*, 457 U.S. at 311 n.7. As one respected authority in the field has observed, "[i]f prison is viewed as a dangerous place for the nonretarded inmate, imagine the threat posed to the individual whose cognitive limitations render him or her vulnerable to the wishes of brighter and more exploitative inmates." George S. Baroff, *The Mentally Retarded Offender*, *in* American Psychological Association, *Manual of Diagnosis and Professional Practice in Mental Retardation*, at 320 (John W. Jacobson & James A. Mulick eds., 1996).[21] *See generally* Jane Nelson Hall, *Correctional Services for Inmates with Mental Retardation*, in *The Criminal Justice System and Mental Retardation: Defendants and Victims* 167-90 (Ronald

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are required to maintain a system in which inmates are able to make their need for mental health care known to staff competent to provide such care before inmates suffer unnecessary and wanton infliction of pain."). Beyond mere numbers, it is also essential that correctional officers receive adequate training in dealing with inmates who have mental disabilities. *See generally* Lisa Callahan, *Correctional Officer Attitudes Toward Inmates with Mental Disorders*, 3 Int'l J. Forensic Mental Health 37 (2004).

[21] *See Ruiz v. Estelle*, 503 F. Supp. 1265, 1346 (S.D. Tex. 1980), *aff'd in relevant part*, 679 F.2d 1115 (5th Cir. 1982) ("[P]rison officials have done little to protect these mentally handicapped inmates from the type of abuse and physical harm which they suffer at the hands of other prisoners.").

W. Conley, Ruth Luckasson & George N. Bouthilet eds. 1992).

And yet mistreatment and neglect of inmates with mental retardation continues to occur. *See, e.g.*, *Ruiz*, 503 F. Supp. at 1346 ("Their special habilitation needs are practically unrecognized by TDC officials, and they are subjected to a living environment which they cannot understand and in which they cannot succeed."); *Taylor v. Mich. Dep't of Corr.*, 69 F.3d 76, 81 (6th Cir. 1995) (failure to protect from rape inmate who had mental retardation). *See generally* George C. Denkowski & Kathryn M. Denkowski, *The Mentally Retarded Offender in the State Prison System: Identification, Prevalence, Adjustment, and Rehabilitation*, 12 Crim. Just. & Behav. 55, 62 (1985) (majority of surveyed state correctional officials acknowledged that inmates with mental retardation were "manipulated and victimized by the general prison population," including sexual exploitation).

In one sense, prisoners with mental disabilities have the same needs as individuals with comparable disabilities outside the prison context. But in another crucial sense, their situation is dramatically different. Unlike their counterparts in the rest of society, prisoners' access to mental health treatment or habilitation is totally controlled by prison authorities.[22] By the very nature of their confinement, prisoners with serious mental illness or mental retardation are deprived of all other avenues for addressing these essential needs. *See generally Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (Having stripped prisoners "of virtually every means of self-protection

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[22] There are indications that the problem of untreated prisoners with severe mental illness may be getting worse. *See, e.g.*, Ronald W. Manderscheid, Aliya Gravesande & Ingrid Goldstrom, *Growth of Mental Health Services in State Adult Correctional Facilities 1988 to 2000*, 55 Psychiatric Services 869 (2004) ("The growth in prison facilities and the growth in prisoner populations are outstripping the more meager growth in mental health services.").

and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.").

B. Prisoners with mental disabilities have been subjected to harmful neglect and mistreatment.

In addition to the central concerns about failure to provide needed treatment and habilitation, prisoners with mental disabilities face discriminatory treatment that is unrelated to legitimate penological interests. For example, the practice of automatically or routinely assigning prisoners with symptoms of mental illness to "administrative segregation" units is particularly troubling.[23] "There is a general consensus among

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[23] In this context, *amici* are using the term "segregation" in the sense that it is generally employed in the management of prisons. *See, e.g.*, American Psychiatric Association, *Psychiatric Services in Jails and Prisons* 5 (2d ed. 2000) ("Inmates who are in current, severe psychiatric crisis, including but not limited to acute psychosis and suicidal depression should be removed from segregation until such time as they are psychologically able to tolerate that setting."). The term segregation is, of course, capable of different meanings. In other disability contexts, it often refers to the provision of mental retardation services in facilities or locations set apart from nondisabled individuals. *See, e.g., City of Cleburne*, 473 U.S. at 462 (Marshall, J., concurring in the judgment in part and dissenting in part) ("A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life . . . ."). *See* 42 U.S.C. § 12101(5) ("[I]ndividuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, . . . [and] segregation . . . .").

While there is severe criticism in the disability community of provision of services in segregated settings, *see, e.g.*, Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* 142 (1993), the extraordinary vulnerability of prison inmates who have mental retardation may sometimes require that their confinement and habilitation occur in settings that provide sufficient protection from other inmates. However, this in no way justifies placing vulnerable inmates with men-

clinicians that placement of inmates in settings with 'extreme isolation' is contraindicated because many of these inmates' psychiatric conditions will clinically deteriorate or not improve." National Commission on Correctional Health Care, *Standards for Health Services in Prisons* 243 (2003).

Nevertheless, some States continue to confine prisoners with serious mental illness in unconstitutional conditions that can only exacerbate their condition. *See, e.g.*, *Jones'El v. Berge*, 164 F. Supp. 2d 1096, 1118 (W.D. Wis. 2001) (conditions of inmates with serious mental illness deteriorating in supermax unit); *Madrid v. Gomez*, 889 F. Supp. 1146, 1267 (N.D. Cal. 1995) (segregation unit cruel and unusual for inmates who are mentally ill and those who "are at an unreasonably high risk of suffering serious mental illness as a result of present conditions" in the segregated unit); *Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1989) (supermax unit housing "mentally ill inmates whose conditions involve dramatic outbursts of screaming, self-mutilation, attempted or staged suicides, throwing of feces and garbage, fires and other distressing behavior" severely affecting other inmates with mental illness); *Walker v. State*, 68 P.3d 872, 885 (Mont. 2003) (describing conditions of confinement and mistreatment of a prisoner with mental illness as "an affront to the inviolable rights of human dignity possessed by the inmate and that such punishment constitutes cruel and unusual punishment when it exacerbates the inmate's mental health condition" and therefore is a violation of state constitutional protections).[24]

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tal retardation in "segregation units," as the term is used in the correctional context.

[24] *See also Casey v. Lewis*, 834 F. Supp. 1477, 1548 (D. Ariz. 1993) ("Despite their knowledge of the harm to seriously mentally ill inmates ADOC routinely assigns or transfers seriously mentally ill inmates to [lockdown and segregation units]. . . . In most cases, the inmates are

II. THE ADA'S PROTECTION OF THE RIGHTS OF INMATES WITH DISABILITIES IS CONSISTENT WITH THE TRADITION OF DEFERENCE TO CORRECTIONAL OFFICIALS.

This Court has repeatedly emphasized the importance of deference to state correctional authorities in the management of prisons. *See, e.g., Turner v. Safley*, 482 U.S. 78, 84-85 (1987) ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources"). *Amici* appreciate the extraordinary difficulties involved in maintaining order in potentially unstable, and even perilous, settings, and recognize the "peculiar and restrictive circumstances of penal confinement." *See Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 125 (1977). Indeed, the appropriate care of inmates with mental disabilities requires that the institutions in which they are confined function safely and effectively.

But the deference to prison authorities that this Court has recognized cannot excuse discriminatory treatment of individuals with mental disabilities. "The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones." *Farmer*, 511 U.S. at 832 (internal citation omitted). Neither the principle of judicial deference to correctional officials nor the broader dictates of federalism require the courts to cast a blind eye to the damaging neglect and discrimination faced by some of the nation's prison inmates with mental disabilities.

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locked down because of behavior resulting from their mental illness," with the decisions made by security, rather than medical, personnel.); *Arnold ex rel. H.B. v. Lewis*, 803 F. Supp 246, 256 (D. Ariz. 1992) (inmate with mental illness was provided "grossly inadequate mental health care . . . . Rather, defendants placed plaintiff in lock down as punishment for the symptoms of her mental illness and as an alternative to providing mental health care.").

Prisoners have constitutional rights that survive even the deprivation of physical liberty that is the essence of imprisonment. *Vitek v. Jones*, 445 U.S. 480, 493-94 (1980). *See also Turner*, 482 U.S. at 84 ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."). Those rights are protected by, inter alia, the Punishments Clause of the Eighth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. They are rights of particular importance to prison inmates with mental disabilities, whose extraordinary vulnerability to mistreatment is a source of serious concern.

Concerned about the pervasive and destructive discrimination it found that individuals with disabilities confronted in public services, and after extensive investigation, Congress codified disability rights and created remedies for their enforcement in Title II of the Americans with Disabilities Act. It did so in a way that clearly encompasses mistreatment and discrimination encountered in prisons. *See Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998).

However, Congress was mindful of the practical differences between disability discrimination and other forms of invidious discrimination it had addressed in other statutes, such as race and gender discrimination.[25] Concerned about the potential costs and disruption of implementing the ADA,

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[25] The fact that Congress, in 1990, crafted a remedial scheme that differed from those designed for racial or gender discrimination certainly does not imply in any way that disability discrimination is a problem of secondary importance. While all invidious prejudice has common roots and features, the efforts to confront its harmful effects involve different templates. For example, racial and gender discrimination have not manifested themselves identically in our history, nor have the necessary remedial measures been exactly the same. The same is true with disability discrimination. Far from betraying a lesser concern about the harms of disability discrimination, Title II's mandate that its enforcers take potential costs and disruptions into account in individual cases suggests that Congress was mindful that its provisions should be proportional to the problem.

it limited the statute's remedial scope, requiring, for example, only "reasonable modifications" of programs and facilities. 42 U.S.C. § 12131(2) (1990). The mandate that courts only require "reasonable modifications" is, in fact, not at all dissimilar from the factors of reasonableness in constitutional remedies in prison cases that this Court announced in *Turner*, 482 U.S. at 89-91.[26] It means that legitimate penological interests, such as security concerns, *see O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987), and rehabilitative interests, *id.* at 351, can, upon a proper showing, prevail over disability claims under the statute.[27]

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[26] While the *Turner* test applies disability claims raised under the Due Process and Equal Protection Clauses, it does *not* apply to cases arising under the Eighth Amendment, where the less deferential "deliberate indifference" standard is used. *Hope v. Pelzer*, 536 U.S. 730, 738 (2002). "This is because the integrity of the criminal justice system depends on full compliance with the Eighth Amendment." *Johnson v. California*, 543 U.S. ___, 125 S. Ct. 1141, 1150 (2005). The remedies enacted by Congress in Title II are so carefully crafted that they are proportional to both standards.

[27] *Amici* are unaware of cases in which lower courts, in implementing Title II, have required actions by prison officials that substantially exceed the requirements of the Constitution. If a pattern of such overly-demanding orders were to occur in the future, appellate review could, of course, ensure that unwarranted interference with correctional authorities would not be imposed.

Indeed, another advantage of permitting Congress to address the problem of disability discrimination is that the legislative process is uniquely capable of adjusting and fine-tuning its remedies based on the practical experience in a statute's implementation. Although Congress drafted Title II in terms that clearly apply to state prisons, it did not address the issue of prison compliance with specificity. *Yeskey*, 524 U.S. at 211-12. If correctional officials in the States were to conclude, at some future time, that courts were imposing excessive or unduly intrusive requirements under Title II, it seems likely that they would find a receptive and sympathetic hearing in the Congress. *See generally* 18 U.S.C. § 3626 (1997) (Prison Litigation Reform Act).

Depriving prisoners with mental disabilities of needed treatment or habilitation will seldom, if ever, have "a valid, rational connection," *Turner*, 482 U.S. at 89, to the legitimate government interest in prison security, and it certainly cannot be justified on rehabilitative grounds. As noted above, prisoners with these disabilities will obviously not have available to them "alternative means of exercising the right" to receive such treatment or habilitation. *Id.* at 90. And it can hardly be contended that providing needed treatment to prisoners with serious symptoms of mental illness or habilitation to inmates who have mental retardation will have some deleterious impact on guards and other inmates.

Indeed, it is the *failure* to provide such treatment or habilitation that imperils the safety of guards and fellow prisoners even as it does potentially irreparable harm to the health and safety of the inmate who has the disability. *See Washington v. Harper*, 494 U.S. 210, 225-26 (1990) ("Where an inmate's mental disability is the root cause of the threat he poses to the inmate population, the State's interest in decreasing the danger to others necessarily encompasses an interest in providing him with medical treatment for his illness."). Finally, prison authorities cannot claim that the alternative, i.e. providing needed treatment or habilitation, is impractical or "unavailable." Successful prison treatment and habilitation programs have been implemented by a number of States. Denying the practicality of such treatment would surely be "an exaggerated response to prison concerns." *Turner*, 482 at 90 (internal quotation omitted).[28]

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[28] *Turner* also mentions as a consideration the impact "on the allocation of prison resources generally." 482 U.S. at 90. However, when the right at issue is grounded in the Eighth Amendment, States cannot justify "deliberate indifference" on the basis of mere fiscal savings. After all, it would not be cost-free to set a prisoner's broken leg. *Cf. Estelle v. Gamble*, 429 U.S. 97 (1976).

Leaving the serious mental illness of a prisoner untreated, or allowing the deterioration of his mental condition or ability to cope with the harsh demands of prison life by failing to provide needed treatment or habilitation, cannot be justified.

Title II is an appropriate tool to address a very serious problem. Making it unavailable in damage actions would have the paradoxical (and arguably perverse) effect of requiring prison disputes about disability discrimination to be litigated as constitutional cases. This would both fail to recognize the seriousness of the problem, and also reduce the flexibility with which it can be addressed. Principles of federalism do not require such a drastic and harmful result.

CONCLUSION

For the foregoing reasons, *amici* urge that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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APPENDIX

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The American Association on Mental Retardation ("AAMR") is the nation's oldest and largest interdisciplinary organization of professionals and other persons who work exclusively in the field of mental retardation. AAMR promotes humane policies, sound research, and effective practices, for people with intellectual disabilities.

The Arc of the United States (formerly known as the Association for Retarded Citizens of the United States), through its 875 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families.

The Bazelon Center for Mental Health Law is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Bazelon Center has engaged in litigation, administrative advocacy, and public education to promote equal opportunities for individuals with mental disabilities. Much of the Center's work involves efforts to remedy disability-based discrimination through enforcement of the ADA.

The National Mental Health Association ("NMHA") is the country's oldest and largest mental health organization representing all aspects of mental health and mental illness. As an organization dedicated to achieving a just, humane and healthy society in which all people are accorded respect, dignity and the opportunity to achieve their full potential free from stigma and prejudice, the NMHA is deeply committed to realizing the promise of the Americans with Disabilities Act and to ending the widespread neglect and discrimination experienced by people with mental illness in penal confinement.

The National Association of Councils on Developmental Disabilities ("NACDD") is a national organization consisting of 55 State and Territorial Developmental Disabilities Councils. NACDD advocates and works toward positive system change on behalf of individuals with developmental disabilities and their families. NACDD supports the removal of all barriers against persons with developmental disabilities to ensure their full participation in society.

The American Psychological Association (APA) is a voluntary, nonprofit scientific and professional organization with more than 155,000 members and affiliates. Since 1892, the APA has been the principal association of psychologists in the United States. Its membership includes the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. An integral part of the APA's mission is to increase and disseminate knowledge regarding human behavior and to foster the application of psychological learning to important human concerns.